No. 20298

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN P. BUCK, Trustee, etc.,

Appellant,

vs.

OSCO SIMPSON, SR.,

Appellee.

APPELLEE'S BRIEF.

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Summary of Argument.

The appellant challenges "the validity of the District Court's order discharging the contempt proceeding based on his finding of May 27, 1965, that Osco Simpson 'is presently unable to comply' with the turnover order. [2 Tr. 39]." See page 16 of Appellant's Opening Brief.

A. Did the District Court have the legal authority to reach a conclusion different from the order of the Referee?

B. Did the District Court so abuse its discretion as to warrant reversal?

Appellee respectfully urges application of the well established rule that "The Trial Court's findings may not be rejected if they can be supported by any rational view of the evidence . . ." *Smallfield v. Home Insurance Company of New York,* 244 F. 2d 337 (By this Court in 1957).

ARGUMENT.

I.

Appellant's assignment of error is that the District Court did not have sufficient evidence upon which to make an order discharging the contempt proceeding based upon his finding of May 27, 1965 that "Osco Simpson is presently unable to comply with the turnover order". At least two classifications of evidence were adduced in the District Court. That evidence which appellant urges was in the nature of a collateral attack upon the Referee's findings and order and that evidence which ran to the court's inquiry of whether Osco Simpson was presently able to comply with the turnover order.

A. The District Court had the legal authority to reach a conclusion different from the order of the Referee based on evidence other than that which was excluded by the rule prohibiting collateral attack, Title 11 of the Bankruptcy Act, Section 69, Paragraph B. It is well settled that the bankrupt may be punished for contempt in failing to comply with an order requiring a turnover to his trustee of assets of the estate which are in his possession and under his control provided that he have the present ability to do so. *In re: McCormick,* 97 Fed 566. In a civil contempt proceeding against a bankrupt to coerce obedience to a turnover order, the bankrupt, confronted by the turnover order, established by prior possession at a time when continuance thereof was a reasonable inference, is confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply and the *fact that he cannot challenge the previous adjudication of possession does not prevent him from establishing a lack of*

present possession. Maggio v. Zeitz (1948), 68 S. Ct. 401, 333 U.S. 56, 92 L. Ed. 476.

B. Did the District Court abuse its discretion so as to warrant reversal?

Admissible Evidence.

The Referee's findings and turnover order was made December 2, 1964 [1 Tr. 16], becoming final December 12, 1964 [1 Tr. 25]. The discharge order of the District Court discharging the contempt proceeding was May 25, 1965 [2 Tr. 39] showing a lapse of time of nearly six months.

The bankrupt and appellee herein on May 25, 1965 took the witness stand under oath and testified upon the following points [2 Tr. 38-40]:

1. Unequivocal denial of the present possession of $72,000 or any portion thereof.
2. Denial of any means or control of $72,000 or any portion thereof.
3. Denial that anyone was holding any sums of money for the bankrupt.
4. A present denial of the ability to comply with the turnover order.
5. Statements revealing the bankrupt's occupation as a contractor and plasterer; that bankrupt was recently employed as a plasterer and was a union worker earning $4.87½ an hour; that his present address was 3315 Norton Avenue, Lynwood, California, at which he paid $75 a month rent; that his wife resided with him and that the bankrupt did not own an automobile nor stocks nor bonds nor real estate. On page 45, the bank-

rupt further stated that if he had possession of the money, he would turn it over to the Court. That he had no motivation or reason of any kind why he would not turn the money over to the Court if he had it, and on page 60 [2 Tr. 60] the bankrupt recited further that his age was 56, that he went to around the 7th or 8th grade in school, had no other kind of formal education, and was born in Northport, Alabama.

In this hearing, the District Court further had the opportunity to view the demeanor and appearance of the bankrupt and to determine the weight to be given to his creditability and veracity.

II.

Appellant argues that the District Court's finding of present inability to comply was "undoubtedly based on the District Court's belief and the bankrupt's explanation that he had made before the Referee," *i.e.,* entirely upon evidence constituting a collateral attack upon the Referee's finding.

There was no finding by the District Court to substantiate the appellant's contention that the Court rested its discharge order solely upon evidence constituting a collateral attack upon the Referee's findings.

The appellee therefore urges the well established rule that: "The Trial Court's findings may not be rejected if they can be supported by any rational view of the evidence . . ." *Smallfield v. Home Insurance Company of New York,* 224 F. 2d 337 (By this Court in 1957). Furthermore, it should be noted that even though appellant objected to the admission of evidence in the cate-

gory of a collateral attack upon the Referee's findings and order, that nevertheless, appellant proceeded to cross-examine the bankrupt upon the same material and subject matter to which he had objected and again it was the appellant who, though he objected to such evidence, introduced the Reporter's Transcript of the proceedings before the Referee [2 Tr. p. 57], and said Reporter's Transcripts were received in evidence and marked as Exhibits 3 and 4 [2 Tr. 58], at his request.

The appellee respectfully suggests that the alleged objectionable evidence be considered as mere surplusage and not in any way prejudicial to the District Court's exercise of its discretion to act upon the other evidence hereinabove recited in reaching its decision.

Conclusion.

For the foregoing reason, the order of the District Court adjudging appellee not in contempt of court should be sustained and the appellee discharged from said contempt proceeding.

Respectfully submitted,

GEORGE A. WILLSON,
Attorney for Appellee.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE A. WILLSON